



POLICE DEPARTMENT

August 2, 2018

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In the Matter of the Charges and Specifications :

- against - :

Sergeant Gelono Joshua :

Tax Registry No. 930442 :

48 Precinct :

Case No.

2015-13959

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At:

Police Headquarters
One Police Plaza
New York, New York 10038

Before:

Honorable David S. Weisel
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB:

Simone Manigo, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent:

Matthew K. Schieffer, Esq.
The Quinn Law Firm
399 Knollwood Road, Suite 220
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To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

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CHARGES AND SPECIFICATIONS

1. Said Sergeant Gelono Joshua, on or about May 20, 2014, at approximately 2300 hours, while assigned to the Patrol Borough Bronx and on duty, in the vicinity of [REDACTED] wrongfully used force, in that without police necessity, he punched Roy Medina about the face causing a laceration.

P.G. 203-11

USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on April 20 and May 2, 2018. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Roy Medina and Ileana Medina as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

Having reviewed all of the evidence in this matter, the Court finds Respondent Not Guilty of the charged misconduct.

ANALYSIS

Introduction

It is undisputed that on May 20, 2014, around 2300 hours, several people were congregating on and around the front steps of [REDACTED] within the confines of the [REDACTED] Roy Medina and his sister, Ileana Medina, were present. Respondent and his partner approached and ordered the group to disperse. Respondent went over to where Mr. Medina was standing and made contact with him.

It is not in dispute that Respondent punched Mr. Medina in the face six to seven times, causing numerous injuries. What is in dispute is who threw the first punch. Mr.

Medina and his sister, Ileana, claimed that Respondent threw the first punch. Respondent asserted that Mr. Medina threw the first punch at him and he was merely trying to defend himself. The Medinas testified that Respondent delivered an onslaught of punches at Mr. Medina, and it was only when Mr. Medina began attempting to defend *himself* that he punched Respondent.

It is further undisputed that Ms. Medina and her elderly relative made physical contact with Respondent during the struggle in an attempt to intervene on Mr. Medina's behalf. Following the struggle with Respondent, Mr. Medina entered the building and went inside his apartment on the first floor. When Respondent tried to follow him into the building, Ms. Medina physically blocked Respondent's entrance into the building by standing in front of the door [Tr. 86, 88, 134, 207].

On a broader and more fundamental level, the question at trial was not just who threw the first punch, but whether Respondent's use of force, even if justified at its outset, was excessive in scope. In other words, the issue is whether Respondent's punching Mr. Medina six to seven times was the minimal use of force necessary to take police action.

ROY MEDINA testified at trial that on May 20, 2014, he was outside in front of the building spending time with his family members, who were playing dominoes. It was about 20 people. Mr. Medina's sister, Ileana Medina, was standing next to him waiting to play in the next dominoes game. Nobody was drinking alcohol or using drugs, but a small speaker was playing music [Tr. 28-29].

According to Mr. Medina, he and his friends socialized in front of their building every evening and they never had been asked by police to leave the area. At approximately 2300 hours, he noticed two police officers approach in a patrol car. The officers spoke to

Mr. Medina's brother, [REDACTED] who was playing dominoes with a group of others at a small table pushed up against the building's exterior wall. The officers told [REDACTED] that they had received a 911 call about a disturbance. Respondent then said, "Get the fuck out of here. Pack up and get the fuck out of here" (Tr. 31-34).

Mr. Medina admitted that he was somewhat agitated prior to the incident, but this was because of the way his sister, Ms. Medina, was physically trying to keep him away from the police officers and avoid trouble. He denied that he was angry at the officer. Despite his agitation, he testified that at no point during the incident did he raise his voice. He conceded that Ms. Medina was pushing him "because she didn't want no confrontation with what I was saying to her, . . . about how I felt about that situation there" (Tr. 74, 92-93).

Mr. Medina testified that Respondent "looked very aggressive." Once Respondent gave Mr. Medina's brother and the others playing dominoes the order to leave, "[t]hey promptly started to pack the stuff up and they were getting ready to leave until the officer came straight to me." Using both hands, Respondent pushed Mr. Medina in the chest, causing his back to hit a car parked behind him. Mr. Medina then put his hands up near his ears with both palms facing forward. Respondent then punched Mr. Medina "[s]traight on my forehead" causing his face to "split" open. According to Mr. Medina, Respondent's punches were particularly damaging because Respondent was wearing a large ring on one of his hands (Tr. 35, 38, 110).

As Respondent was striking Mr. Medina, his sister Ileana Medina tried to intervene and asked why the officer was "attacking" him. At one point, Respondent appeared to misstep, slipping and causing Respondent to fall backward. Mr. Medina testified that as

Respondent fell to the ground, Respondent grabbed him, also causing Mr. Medina to fall. Respondent fell on his back and Mr. Medina landed on top of him (Tr. 40-42).

According to Mr. Medina, he then stood up and allowed Respondent to get up off the ground. As he was standing up, however, Respondent continued "pounding" him. At that point, Mr. Medina testified, "I said I had enough, I had to fight back because he wouldn't stop hitting me, especially with that ring. It felt like he was hitting me with brass knuckles." According to Mr. Medina, he punched Respondent a couple of times in the head. Respondent then "rammed" Mr. Medina into the same car he previously had been pushed against. This time, however, Respondent pinned Mr. Medina to the car by placing both hands around his neck and pressing him into the car. Sometime thereafter, Respondent lost his grip on Mr. Medina. Mr. Medina's adult son approached him from behind, picked him up, moved him away from Respondent, and into the building (Tr. 42-45).

Mr. Medina testified that Ms. Medina and other family members gathered in front of the building's entrance, blocking Respondent from entering the building. Shortly after entering his apartment on the first floor, Mr. Medina collapsed and lost consciousness. An ambulance arrived sometime thereafter and transported him to the hospital. While being treated, he was arrested for assaulting a police officer. Mr. Medina testified that as a result of Respondent punching him all over his face, he suffered from "a lot of lumps" on his head and a laceration on his forehead requiring stitches (Tr. 39, 46-47, 49, 253; CCRB Ex. 1a-l, photographs of Medina; Exs. 3-4, hospital and ambulance records, respectively).

According to Mr. Medina, at no point while standing in front of the building did Respondent indicate that he was being placed under arrest. In fact, Mr. Medina testified

that if Respondent "would have told me put your hands behind your back," he would have willingly complied (Tr. 49).

ILEANA MEDINA testified that on the day of the incident, it "was a beautiful day. Everybody decided to want to come outside. . . . And we were goofing, we were laughing, we were giggling" on the staircase leading into the building and on the sidewalk in front of the building. Her brothers were "acting like crazy people" and dancing. Her brothers [REDACTED] and [REDACTED] were playing dominoes to the right of the staircase (Tr. 123-24, 184).

When Ms. Medina noticed Mr. Medina "mumbling something" after Respondent approached, she moved toward Mr. Medina to see what was going on. His voice was so low she could barely hear what he was saying, even though she was within inches of his face. Then, completely unprovoked, Respondent went around Ms. Medina's right side, grabbed Mr. Medina by his shirt, pushed him up against a parked van, and punched him repeatedly. Respondent did not say anything or give any warning prior to grabbing Mr. Medina. He punched Mr. Medina in the face, causing him to bleed from his forehead. Ms. Medina tried to intervene by putting herself in between Respondent and Mr. Medina in order to stop the punching. Ms. Medina testified that she saw Mr. Medina hit Respondent back only once (Tr. 127, 129-31).

RESPONDENT presented a much different version of events at trial. He testified that he was performing routine patrol duties on the date of the incident as the supervisor of the former Impact program. At one point he wanted to get something to eat, so he and his driver stopped at a store on 182nd Street. He noticed a group of about 20 people congregating on the sidewalk and street (Tr. 199, 251-52).

Respondent first approached a group of men playing dominoes and said "hey, guys, let's wrap this up, it's a school night. You're making noise." Though initially reluctant, the men started to slowly move. There had been no complaints to 311 or 911 regarding excessive noise (Tr. 200, 211).

A few feet away, Roy Medina, whom Respondent described as agitated, said, "[F]uck that, I pay my taxes." As the rest of the group started to slowly disperse, Mr. Medina said, "This is a free country, fuck that." Respondent indicated that he attempted to get Mr. Medina to disperse by saying "go ahead with that" and holding up his hand as though to say "stop." Mr. Medina then said "fuck that nigger." Respondent is African-American; Mr. Medina is not (Tr. 200-02, 211, 214-16, 219, 226, 251).

Respondent asserted that he gave "several orders" to the group to disperse before he approached Mr. Medina. He testified further that he "tried to explain what my goal was" in asking the group to disperse and believed he had been patient in doing so (Tr. 210).

Respondent then moved toward Mr. Medina, grabbed his left hand in order to put it behind his back and told him that he was under arrest. Mr. Medina then "wildly jerked away" from Respondent and "immediately took a swing" at him with a closed fist. Respondent testified that he grabbed Mr. Medina's wrist because he was going to issue him a disorderly conduct summons for refusing to disperse and blocking pedestrian traffic. Because of the large crowd in the area, Respondent wanted to bring Mr. Medina back to the precinct to do so. Respondent asserted that he told Mr. Medina he was under arrest, though he did not order Mr. Medina to put his hands behind his back (Tr. 203-05, 220, 222-23, 225-26, 229).

Respondent was able to dodge the first punch Mr. Medina threw at him, but Mr. Medina swung at him again so Respondent punched him in the face. Mr. Medina then landed a punch on Respondent, initiating what Respondent described as "a full brawl" leading into the street and up against parked cars. Respondent testified that Mr. Medina punched him about six or seven times (Tr. 205, 253).

Mr. Medina's relative was hitting Respondent with a water bottle while he was struggling to gain control of Mr. Medina. At some point, Respondent was "taken down from behind" and laying on his back on the ground. Mr. Medina was, at that point, on top of Respondent. Mr. Medina, however, was able to get up and the crowd "whisked him away into the building." Respondent tried to go after him into the building but several people physically blocked his entry and began pushing him. Eventually, Respondent again was pushed to the ground. "I felt like I was fighting for my life out there" (Tr. 206-08).

Once additional officers responding to Respondent's 10-85 call arrived on the scene, Respondent went into the building looking for Mr. Medina, but was unsuccessful in finding him (Tr. 209).

Respondent later received a call from the patrol supervisor, who told him that someone had called the Internal Affairs Bureau. The patrol supervisor wanted to know if this was related to the 10-85. When the patrol supervisor went to the hospital to interview Mr. Medina, Respondent responded there as well and confirmed to his colleague that this was the person he was fighting with. Mr. Medina then was placed under arrest. Respondent then himself went to a different hospital, where he was treated for back and arm pain, as well as a bruise on his face. He was out sick for about one week after the

incident. He conceded it was only after he learned Mr. Medina was at the hospital that he decided to seek treatment himself (Tr. 209-10, 246).

The **CELL PHONE VIDEO** and **SURVEILLANCE VIDEOS** (Ex. 2) do not capture either the entirety of the incident, nor the moment when physical contact between Respondent and Mr. Medina first occurred. The cell phone video begins in medias res (Tr. 82-83), and the surveillance videos are essentially before and after the contact between Respondent and Mr. Medina.

Analysis

Here, as in any excessive force case, the threshold question is whether there was cause for force to be used. If there was not, any force used was unjustified. If there was cause, then the inquiry focuses on whether the amount of force exercised by Respondent was reasonable. To make this determination, it is necessary to examine the context in which the force was used and the amount of force exercised. See Police Department v. Giglia, OATH Index Nos. 1197-98/90 (Nov. 8, 1990), confirmed sub nom. Matter of Gatto v. Brown, 234 A.D.2d 22 (1st Dept. 1996).

First, the Court credits Respondent over the Medinas as to the fact that Roy threw the first punch at Respondent when the latter tried to arrest him. There were several key factors that convinced this tribunal Respondent was telling the truth.

This tribunal found Respondent to be generally forthcoming in his testimony and he acknowledged various facts that were not particularly helpful to his case. For example, Respondent was straightforward in his admission that he punched Mr. Medina numerous times during the incident. He admitted that his order to disperse was a decision he made on his own, rather than the result of a complaint. He admitted that he only decided to

arrest Mr. Medina after the latter used the N-word, opening the possibility that, as the CCRB argued, hearing this slur led to a "vendetta" against Mr. Medina (Tr. 268). Respondent admitted that he did not tell Mr. Medina to put his hands behind his back before he punched him. And he admitted that he only sought medical attention once he learned IAB was in the process of interviewing Mr. Medina, evidence that could be used to support the possibility that he was trying to insulate himself from scrutiny by presenting himself as the victim (Tr. 261).

In contrast, Mr. Medina's version of events came across as narrowly self-serving. The Medinas' testimony played down their actions during the incident so that they would appear more sympathetic. For example, the Medinas asserted that Mr. Medina was speaking in a low tone at most, and never raised his voice. The CCRB argued that he was not saying anything at all (Tr. 268). Yet the sidewalk surveillance video demonstrates that Respondent moved toward Mr. Medina after taking notice of him. This supports the conclusion that Mr. Medina was talking loudly enough for Respondent to hear him.

Additionally, Mr. Medina's assertion that Respondent was wearing a large "fashion ring" on his right hand at the time of the incident seemed contrived to amplify the extent of the injuries Mr. Medina suffered. Respondent was not married and denied wearing any rings. It should be noted that Patrol Guide § 203-07 (11)(c) prohibits wearing rings on duty if they have raised stones, jagged edges, or are likely to catch on something (Tr. 99, 108, 110, 208-09).

It was, however, Mr. Medina's unwarranted aggressiveness and agitation upon hearing a lawful order to disperse from a sidewalk on a weekday night around 2300 hours that persuaded this tribunal that Mr. Medina, and not Respondent, started the physical

altercation at issue here. Mr. Medina's level of agitation was so high when Respondent approached the group that his own sister was restraining him and pushing him away from the officers who were standing at a distance of at least several feet. Mr. Medina's own testimony before this tribunal was that his sister detained him "because she didn't want no confrontation with what I was saying to her, . . . about how I felt about that situation there." Within this context, his denial that he was not angry at the officer's intervention carries little weight.

The sidewalk surveillance video demonstrates in additional ways that Mr. Medina testified inaccurately about the events leading up to the confrontation with Respondent. Respondent is shown arriving and speaking to the persons on and near the stoop. No one reacted as though he was speaking profanely. He was not gesturing angrily at the individuals. His demeanor appeared calm and composed, making it unlikely that he was saying, "Pack up and get the fuck out of here" as Mr. Medina claimed at trial. The persons at the stoop react nonchalantly and do not move quickly but eventually complied with Respondent's directive. All the while, Mr. Medina was being restrained and Respondent was calm. Only after approximately a minute and 15 seconds of this did Respondent stride over toward Mr. Medina, off camera.

Further, the Court finds that there was cause for Respondent to punch Roy several times during the incident and that this force was not excessive. As noted above, the cell phone video provides important insight into the unruliness of the incident. Following the initial contact with Mr. Medina, Respondent was swarmed by civilians physically trying to interfere. The scene very rapidly became chaotic, and Respondent was outnumbered by a group of people that were physically interfering with the arrest. The resulting situation

pitted Respondent against Mr. Medina as well as an entire crowd of people. Mr. Medina's claim that he passively allowed Respondent to punch him several times, until he could no longer take it and decided to start punching back, is highly dubious. It is likelier that Mr. Medina, having thrown the first punch to avoid being arrested, kept punching Respondent. Respondent was permitted to punch him back. The mere fact that Respondent had a size advantage over Mr. Medina (Respondent is 5'8" tall and weighs about 165 pounds, whereas Mr. Medina is 5'6" and about 120 pounds) did not preclude him from using force against Mr. Medina in this situation. Indeed, Mr. Medina conceded that he was able to punch Respondent several times.

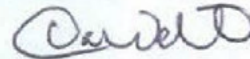
This incident and the injuries suffered by both Mr. Medina and Respondent are the unfortunate result of what very quickly became a volatile and dangerous situation. Respondent was attempting to arrest and handcuff Mr. Medina during their struggle, and under such circumstances, Department members are permitted to take decisive action with regard to the use of force. *See Case No. 2013-10385*, p. 7 (June 19, 2015) (sergeant tackling disruptive bystander onto subway platform, causing laceration requiring deep sutures, "well may [have] be[en] one of those instances where the officer's use of force looked 'awful,' but was in fact 'lawful.'"). The photographs of the knot to the forehead and two- to three-centimeter laceration suffered by Mr. Medina do look serious. But he was permitted to resume his normal routine upon discharge several hours later, and was prescribed only a four-day course of acetaminophen. He only was directed to return to the hospital for suture removal (Ex. 3, hospital records, p. 8).

In sum, based on the relevant and credible evidence presented at trial, this Court finds that the CCRB failed to prove by a preponderance of the credible evidence that

Respondent's punches were without police necessity, rather than the result of a back-and-forth altercation in which Respondent was authorized to use force in defending himself.

Therefore, the Court finds Respondent Not Guilty.


Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED

OCT 12 2018



JAMES P. O'NEILL
POLICE COMMISSIONER